BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

REPLY COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Introduction and Summary

The New York State Department of Public Service ("NYDPS") submits these Reply Comments in response to Comments filed addressing the Commission's inquiries regarding the appropriate regulatory treatment of Internet protocol ("IP")-enabled services in its March 10, 2004 Notice of Proposed Rulemaking ("NPRM") in the above-entitled proceeding.

As we stated in our initial comments, the NYDPS' primary interests in regulating IP-enabled services are in promoting the provision of essential public services (e.g., public safety and security) and ensuring the reliability of public communications networks.[1] Furthermore, New York is and has been a leader in delivering competitive and innovative offerings to its consumers of communications services. Accordingly, the policy of the New York Public Service Commission has been and remains to satisfy important public interests and to support new technologies and competitive alternatives.

Employment of IP in telephony is nothing new. Likewise, telephony is not transformed into a new service when it utilizes the Internet as a transmission path.

[1] NYDPS Initial Comments at 2.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, is technologically neutral. In addition, difficulty in separating interstate and interstate calls using the Internet does not support federal preemption of state regulation over intrastate communications, because regulation rarely depends upon the endpoints of particular calls. Preemption may only occur when the interstate and intrastate components of regulation, rather than the interstate and intrastate components of the service, are inseparable. Regulation does not typically break down neatly into components that precisely align with interstate versus interstate usage. Lastly, nothing in Sections 230(b), 253(a), or 706 of the Telecommunications Act of 1996 justifies preemption of state regulation of IP-enabled services.

I. The use of IP and/or the Internet for telephony does not create a new service subject to exclusive federal jurisdiction.

Some parties assert in their comments that telecommunications services should be afforded special regulatory treatment merely by virtue of being transmitted via the Internet[2] and/or IP.[3] We disagree with this conclusion. First, employment of IP in traditional telephony is nothing new. Traditional telephone networks currently use a variety of formats or protocols, including IP, to carry calls, and regularly convert among and between these protocols as a routine aspect of providing telephone service. The use of IP does not alter the nature of that service. Second, a communications service that

[2] "The Internet is both a transport network – moving every form of data around the world (voice, video, data and images) – and a network of computers which allow you (and them) to access, retrieve, process and store all manner of information … At its heart, the Internet is many large computer networks joined together over high-speed backbone data links." Newton, Harry, Newton's Telecom Dictionary 433-34 (20th ed. 2004).

[3] See e.g., BellSouth Comments at 8, 11, 26; pulver.com Comments at 13.

utilizes the Internet only as a transmission path, without providing any user interaction with stored content or ability to manipulate information, is indistinguishable from the same service offered via traditional telephone facilities. Third, the Communications Act of 1934 ("the Act"), as amended by the Telecommunications Act of 1996 ("the 1996 Act"),[4] is indifferent to the technology utilized to provide telecommunications. As the 1996 Act's definition of "telecommunications service" plainly states, such services are so classified "regardless of the facilities used."[5] To the extent such services do not offer to the end user[6] a capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,"[7] they are not information services and should therefore be regarded as simply a telecommunications service provided by different technology. We agree with Earthlink that "the mere presence or absence of IP in a network or service does not … determine the regulatory classification of that network or service."[8] Moreover, the Commission has stated that "Congress made clear that the

[4] 47 U.S.C. §§ 151 *et seq.*

[5] 47 U.S.C. § 153 (46).

[6] The Commission has found, for example, that while certain protocol conversions may constitute information services, see Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, 11 FCC Rcd 21905, 21956, ¶ 104 (rel. Dec. 24, 1996), they are not information services when they result in no net protocol conversion to the end user, id. at 21957, ¶ 106.

[7] 47 U.S.C. § 153 (20).

[8] Earthlink Comments at 10.

1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[9]

II. Inseparability of interstate and intrastate calls is not grounds for federal preemption of state regulation.

Some parties argue that communications transmitted over the Internet should be subject to exclusive federal jurisdiction because it is impossible to separate intrastate and interstate communications occurring on the Internet.[10] As a legal matter, separation of interstate and interstate calls using the Internet and/or IP-enabled technology by geographic endpoint location need not occur in order for the Commission and the states independently to regulate such calls. As the U.S. Supreme Court stated in Louisiana Public Service Comm'n v. FCC,[11] federal preemption of state regulation may be upheld only where it is impossible to separate the intrastate and interstate components of *regulation*,[12] rather than the intrastate and interstate components of the *service*. This distinction is important because regulation does not typically break down neatly into components that precisely align with interstate versus intrastate usage. State and federal regulation of telephony is rarely dependent upon the endpoints of particular calls. For example, rules requiring a carrier to provide advance notice of its intent to terminate service or requiring a carrier to comply with a state commission's consumer complaint

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[9] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24017, ¶ 11 (rel. Aug. 7, 1998).

[10] See e.g., Consumer Electronics Association Comments at 3, Vonage Comments at 16-17.

[11] 476 U.S. 355 (1986).

[12] See id. at 375 n. 4.

handling rules do not require jurisdictional determinations concerning individual calls. Indeed, no aspect of telephone service itself requires call endpoint determinations, except for billing purposes where the provider chooses to apply different rates to different types of calls (e.g., interstate, interstate, toll or local).[13] Neither the NYDPS nor the Commission require that intrastate and interstate calls be identified and billed separately. Nor would the application of state rules dictate a provider's responsibilities in other states. As applications of state-specific regulations are not contingent upon identifying call endpoints, IP-enabled service providers are just as capable of complying with different regulatory requirements in different jurisdictions as are any of the hundreds of multi-state telephone companies that do so on a daily basis. Therefore, state regulation of IP-enabled services may not be preempted by the Commission on the ground of difficulty in identifying geographic endpoints of individual communications.

To the extent that state regulation of IP-enabled services would ever depend upon identifying the endpoints of a call, it appears that at least one technical solution to the endpoint identification problem may be on the horizon. Vonage states in

[13] Where the interstate or intrastate nature of traffic is relevant to particular regulations, such as those governing access charges, a reasonable estimate will suffice. Indeed, the Commission has previously contemplated the use of traffic estimates to allocate costs of an IP-enabled, Internet-based service between state and federal funds. See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, 7785, ¶ 17 (rel. April 22, 2002). The Commission ultimately decided to assign all cost recovery to the federal jurisdiction, but did so largely to foster a quick resolution. Id. at 7786, ¶ 20. Nevertheless, it continued to solicit comment on methods for intrastate/interstate cost allocation. Id. at 7792, ¶ 41.

its initial comments that it is "actively working to resolve the location issue associated with VoIP service," and is currently conducting trials in five states.[14]

III. Sections 230(b), 253(a) and 706 of the 1996 Act may not be invoked to preempt state regulation of IP-enabled services.

Qwest and Pac-West both argue in their comments that Section 230 (b) of the Act[15] carves out an exception from the Section 152 (b) reservation of state authority over intrastate communications.[16] The Supreme Court, however, has stated that Congress' intent to give the Commission authority over any aspect of intrastate communications must be explicit.[17] Section 230's policy statement expressing a preference for preserving free markets for Internet services is simply too vague to constitute a grant of rulemaking authority. Moreover, as we stated in our initial comments, Section 230 is aimed at regulation of stored content.[18] It does not pertain to usage of the Internet as a transmission path for real-time telephonic communications. In any event, should the Commission find that an Internet-based IP-enabled service is an information service, whatever authority the Commission may possess to regulate (or deregulate) that service would arise from its ancillary jurisdiction.[19] The Court in Iowa

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[14] Vonage Comments at 40.

[15] 47 U.S.C. § 230(b).

[16] Qwest Comments at 27; Pac-West Comments at 15.

[17] AT&T v. Iowa Utilities Bd., 525 U.S. 366, 378 n.7 (1999) (Commission may regulate local telecommunications competition only because Congress explicitly gave it rulemaking authority in that area.)

[18] NYDPS Initial Comments at 7-8.

[19] See Computer and Communications Industry Ass'n v. F.C.C., 693 F.2d 198, 213 (D.C. Cir. 1982) (upholding Commission's assertion of ancillary jurisdiction over enhanced services, which the Commission had found to be outside the reach of Title II).

Utilities Board further held that the Commission may not utilize its ancillary jurisdiction to preempt state regulation of intrastate communications.[20] Consequently, Section 230 (b) does not override the Section 152 (b) reservation of state authority to regulate intrastate communications.

The National Cable and Telecommunications Association and the Computer and Communications Industry Association assert in their comments that Section 253(a) of the 1996 Act permits the Commission to preempt state regulations that would interfere with the deployment of VoIP.[21] The Commission's test for determining whether a state or local law has the effect of prohibiting the provision of telecommunications services is "whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[22] Most important is that until a state has acted, the Commission cannot declare that state regulation is a barrier to entry. In any event, New York's intent is to subject IP-enabled service providers to regulation that is fair vis-à-vis other competitive carriers, taking into consideration any differences between IP-enabled service providers and those carriers. On one hand, IP-enabled service providers' differences with respect to other competitive carriers may justify lightened regulation, but

[20] Id. at 381 n.8.

[21] National Cable and Telecommunications Association Comments at 38; Computer and Communications Industry Association Comments at 20.

[22] California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206, ¶ 31 (rel. July 17, 1997). The Second Circuit concurs with this test. TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002).

on the other hand, IP-enabled service providers should not be granted unfair regulatory advantages.

Several parties noted in their comments that Section 706 of the 1996 Act requires the Commission to remove regulatory barriers to the deployment of advanced services.[23] These parties argued that Section 706, therefore, empowers the Commission to preempt state regulation of IP-enabled services. The plain language of Section 706, however, provides that "[t]he Commission *and each State commission* … shall encourage the deployment … of advanced telecommunications capability."[24] Thus, Congress clearly provided for dual federal-state jurisdiction over advanced services.[25]

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Dated: July 14, 2004

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[23] See e.g, Verizon Comments at 40, Consumer Electronics Association comments at 3.

[24] 1996 Act § 706 (a).

[25] Moreover, the Commission has defined "advanced telecommunications capability" as services capable of transmission speeds in excess of 200 kilobits per second both upstream and downstream over the last mile. NPRM at ¶ 3 n.3. To the extent that some IP-enabled services are transmitted at less than this rate, Section 706 would not apply to those services.